find the language. "In *State v. Abraham*, 338 NC 315, a 1994 case, our Supreme Court upheld the trial court's denial of the defendant's motion for an eyewitness identification expert."

And then it goes further that, they distinguished, because this is a psychiatric expert, they quoted *State v. Ballard*, a 1993 North Carolina Supreme Court that said, an ex parte hearing, in order to apply for funds in that case for a fingerprint expert, distinguished the case before them. And Your Honor, what the Court found instructive was that when you request a psychiatric expert, you are asking for things that the State should not be aware of, you are allowing the State to have notice of your defense, where the physical -- however, when they found the physical evidence and not the defendant is the object of adversarial scrutiny, then that was the issue.

Here in this case, the *State v. Garner*, they found that an eyewitness identification expert is offered to undermine the reliability of the testimonial identification of the defendant, whereas the absence of a psychiatric expert puts at risk the availability of an insanity or a diminished capacity defense strategy. So finding *Phipps* controlling, the decision to deny an ex parte hearing was within the trial court's discretion.

And then they went on to find that since the defendant

was unable to establish a threshold showing of a need for an expert, there was no prejudice in this case when the Court denied the defense an identification expert.

Now, this is just a case I have for another matter, but when she began speaking of this I pulled it. Another aspect that was interesting, in this case the defendant goes on later to apply in a motion for appropriate relief and say that there is new evidence of an identification expert. And the Court found that since an identification expert would merely tend to contradict, impeach, or discredit the testimony of a former witness, that it did not meet the standard for a motion for appropriate relief new evidence and denied the defense the ability to claim new evidence in the form of this type of witness.

So, Your Honor, I know there's two matters here. One, should you appoint one ex parte, and two, what would be the bearing or weight here. The State would argue that an identification expert is not new evidence and thus it is irrelevant to the hearing at hand. All the defense wants to do is take the testimony of Miss Bost and contradict it, and that is what is not allowed under the seven step process of new evidence.

THE COURT: Ms. Bennick, what would take this motion within the purview of *Ake* so as to make it something that I ought to consider ex parte?

MS. BENNICK: Well, Your Honor, my understanding of *State v. Ballard, State v. Bates,* the commentary to the General Statute of 7A-450, 7A-454, *State v. Anderson, State v. Gambrill*, that these applications are entirely to be made ex parte. I have not seen anything contrary to the law. Whether it's granted or not is not the issue. It's clear to me from my research that the application -- and honestly, from the IDS web site and the defense manual there, that these are done ex parte.

And I believe actually, Your Honor, so you know, I haven't read the *Garner* case. Ms. Vaneekhoven just handed me a copy of it. But I just told that ultimately Terrence Garner was exonerated.

THE COURT: I'm sorry?

MS. BENNICK: That Terrence Garner was exonerated in the case that she's cited to. I, in my research I can't honestly tell you that I found this case and I honestly have not had an opportunity to read it. He was ultimately exonerated after he had been convicted of first degree murder.

MS. SHANLEY: Your Honor, I contend that's irrelevant to whether this Court should ex parte order a motion for an eyewitness identification expert, and also whether that would be admissible at a motion for appropriate relief.

THE COURT: And that's the reason I wanted to address this first of all from the standpoint of whether or not it ought to be an ex parte matter, and then secondly as to whether or not the motion ought to be granted. Obviously this request is somewhat different from a situation in which a defendant is at least investigating the possibility of mounting a defense that might include psychiatric or psychological testimony. If we're talking about a defense strategy of wanting to use an eyewitness identification expert, does the defendant have any interest in wanting to -- I mean, obviously at this point we're talking about an area of expertise that has been disclosed in open court. So --

MS. BENNICK: I just can only quote, Your Honor, I mean, honestly, from *State v. Moore* where the Court of Appeals, the North Carolina Supreme Court, "The question of whether defendant should have been provided" -- this was a fingerprint expert -- "the question of whether the defendant should have been provided with the assistance of a fingerprint expert is controlled by *Ake v. Oklahoma*. *Ake v. Oklahoma* requires an ex parte special showing that the matter subject to expert testimony is likely to be a significant factor in the defense."

Your Honor, the *State v. Moore* panel Supreme Court went on to say that an indigent defendant is not required

to apply for funds in the open Court since he would be forced to reveal to the State the identity of the expert he intends to consult and make a public showing of this evidence in the case which is not required by the law. And I'm quoting from *State v. Moore* in 321 NC 327 (1988).

And then there were a few Fourth Circuit opinions that I also found. The Fourth Circuit case is *U.S. v. Little*, 17 F3d 1435, which is also citing *U.S. v. Harris,* 95 F2d 532. These are Fourth Circuit cases 1994 and 1993. And that's I found. That's what law I relied upon.

THE COURT: Well --

MS. SHANLEY: Your Honor, just to respond I think to that argument, the case she cited, *State v. Moore*, was a 1988 case. However, in the *Garner* case -- and Your Honor, I do have a copy of that if you would like. In this case the case quotes *State v. Ballard,* and that's a 1993 case, and again said that our courts have said that when granting a psychiatric expert, yes, the defendant should have ex parte order.

THE COURT: I'm sorry?

MS. SHANLEY: That in *State v. Ballard*, a 1993 Supreme Court case, that if the issue of a psychiatric expert for the defendant, that yes, the defendant is entitled to an ex parte hearing. However, the Court also notes *State v. Phipps*, and that is a North Carolina Supreme

case, it's a 1992 case, would be older than the *State v. Moore.* It's on page 8 of the opinion. And here they quote, "The Supreme Court considered whether defendant's rights to due process, effective assistance of counsel, and reliable sentencing in a capital murder trial mandated that his motion for funds to employ a fingerprint expert be heard ex parte." And the Court notes that the defendant's right to obtain the expert assistance without losing the opportunity to prepare a defense in secret was a strong reason.

However, the *Phipps* Court held that the defendant was not entitled to an ex parte hearing, nor was he actually entitled to funds to employ a fingerprint expert in that case. The Court went on to state that an indigent defendant's access to the basic tools of the adequate defense is a full requirement, the need for an parte hearing for a motion for expert assistance is not. So what we have is the Supreme Court making a distinction, depending on what type of expert you're requesting. If it's something that would need to be discussed in secret between defense counsel and the judge, such as psychiatric expert testimony, then yes, an ex parte hearing is appropriate. However, when you are asking for other evidence such as fingerprint evidence in *State v. Phipps*, or in this case, an eyewitness identification expert, *State*

v. Garner, an ex parte hearing is not appropriate.

THE COURT: With respect to the defendant's motion for an ex parte hearing for purposes of considering whether or not to appoint or approve funds for the employment of an expert in the area of eyewitness identification, this Court determines that the following reasoning of the North Carolina Supreme Court in *State v. Ballard* and *State v. Phipps*, that the question here is whether or not the defendant is entitled to an ex parte hearing at the stage in which the defendant attempts to make a threshold showing of the need for an expert in this particular area, and that an expert in the field of eyewitness identification is substantially different from the issues presented by a request for approval of funds to employ a psychiatric or psychological expert in connection with a proceeding.

As the Court noted in the *Ballard* case, there is a difference between a hearing on a question of an indigent defendant's right to certain types of experts as contrasted with the right to a psychiatric expert in that a psychiatric or psychological expert relates to an object of adversarial scrutiny relating not only to mere physical evidence, but the defendant himself. The matter is not tactile and objective, but one of an intensely sensitive personal nature, and that the defendant's constitutional

rights in the present area of inquiry are far less likely to be jeopardized by the presence of the prosecutor when the defendant attempts to make the threshold showing for the use of an eyewitness identification expert as contrasted with the field of psychiatric or psychological experts. For that reason I conclude that this matter ought to be addressed in open court rather than through an ex parte proceeding.

Now, with that having been said, are the parties ready to go forward with the issue of addressing this motion in open court?

MS. VANEEKHOVEN: No, Your Honor. We'd like a copy of the motion. We'd like to see any cases that they might reference and do our research accordingly.

THE COURT: Let's hold that at least momentarily then and proceed with any other issues we have. The other point I had is on the question of subpoena for hospital records, is that a contested issue?

MS. BENNICK: I would need to ask Ms. Vaneekhoven if that would be objectionable to her to have the victim's medical records admitted into evidence without having the custodian come over here and say we had them and we, here they are and give them to Judge Spainhour. In fact, I believe --

THE COURT: So the question is whether or not

you need a records custodian for purposes of authentication of those hospital records.

MS. BENNICK: That's correct.

MS. SHANLEY: I'm sorry. I was under the impression that she wanted to subpoena the hospital now and get the full records, although Judge Spainhour went through them and only gave redacted copies.

MS. BENNICK: No, Your Honor --

THE COURT: I take it you're merely talking about authentication, getting the records into evidence.

MS. BENNICK: I was talking about authentication, right. I'm not asking --

THE COURT: Is the State prepared to stipulate as to the authenticity of those records that the defendant would seek to offer?

MS. SHANLEY: Your Honor, if perhaps you could just let us see the records she seeks to offer --

MS. BENNICK: I'd be happy to, Your Honor. It's exactly the ones that Judge Spainhour turned over to me and to --

THE COURT: We're going to take a short break in a few minutes and perhaps that's something -- what I would request is that during the time we're in recess for the morning break, that you all exchange, one, whatever information you wish to share concerning motion for funds

for an expert witness, and two, anything you wish to exchange concerning hospital records.

MS. BENNICK: Sure.

THE COURT: So we can streamline that process. The final point that I'd like to raise before we have that morning break is the issue of cameras in the courtroom. Does either side wish to be heard with respect to the request for media to bring cameras into the courtroom for the purposes of filming these proceedings?

MS. BENNICK: No. We have no position on that one way or another. It's in your discretion.

THE COURT: Does the State have any position one way or the other?

MS. SHANLEY: No, Your Honor. I know our last capital case was filmed by the media and I think the media outlets agreed to have one camera that they would share with some arrangement. That helped without having to disturb the proceedings if something like that were to be ordered.

THE COURT: The request that I have is from Mr. Stewart Watson. Is Mr. Watson present in the courtroom?

MR. WATSON: Yes, sir, Your Honor.

THE COURT: Mr. Watson, are you speaking only on behalf of your station or do you have any sharing or

collaboration arrangement among media?

MR. WATSON: We do when there's a request. There's been no request. If there were a request we'd be happy to share.

THE COURT: I'm going to grant your request. I will allow one camera in the courtroom beginning immediately after the morning break. How long will it take you to get that in and set it up?

MR. WATSON: Five minutes.

THE COURT: So obviously we don't have any jurors in this case, so we don't have the restrictions that are normally in play as to filming of the jurors. But I will allow one camera in the courtroom in a stationary position so long as it does not present any distraction.

MS. SHANLEY: Your Honor, in the last case we had the camera in the back of the room there focused this way (indicating) and that seemed to be beneficial to everyone.

THE COURT: All right.

MS. BENNICK: Your Honor, if there is going to be a camera in the courtroom, depending on what your limited instructions might be about where it's pointed, I would ask if Mr. Long would be allowed to put on the suit that his family took to the sheriff's department last evening.

THE COURT: State wish to be heard?

MS. VANEEKHOVEN: I don't think he has any right to that. There's not a -- there aren't jurors here and I think that would strictly be for show.

THE COURT: Sheriff's office have a position on that point?

BAILIFF: That's not something we normally do unless it's a jury -- but I don't know of a case where we've ever dressed somebody out in their street clothes that wasn't in front of a jury.

THE COURT: Are there any security concerns in this case?

BAILIFF: Well, we haven't had time to go through the clothing that was dropped off. It would have to be thoroughly searched and all before we would able to dress him.

MS. SHANLEY: Your Honor, as a security concern, yes, the defendant has at least 50 violations in Department of Corrections --

MS. BENNICK: I'm going to object to this, Your Honor. We're getting way off kilter here. This is nothing but prejudicial and I have a real problem with that.

THE COURT: Well, in the exercise of discretion in order to avoid any delay, I'll deny the request for a change of clothes for the defendant at this time.

I will note for the record that it makes absolutely no difference to me. I will certainly not be influenced, as the fact finder I'll certainly not be influenced by whatever clothes the defendant is wearing for these proceedings.

MS. BENNICK: Your Honor, I have one last thing if you're done.

THE COURT: Yes, ma'am.

MS. BENNICK: I'd like to make a motion that all of the witnesses, including my own, be, you know, excluded from the courtroom. They testify one at a time. They're not all in here listening to one another testify.

THE COURT: Motion for sequestration of witnesses.

MS. BENNICK: Correct.

THE COURT: All right. Does the State wish to be heard in that regard?

MS. VANEEKHOVEN: Your Honor, I would not oppose the motion to this extent. When we exchanged witness lists, I believe it was like Thursday or whatever day we had our conference call last week, we were over-inclusive in that list because we weren't certain what their list would entail. So I would ask you to restrict that order to those that we intend to call, because there are some names on that list that based on what they sent

us, we will not call.

THE COURT: Well, here's the problem. If I enter a sequestration order and it applies only to certain witnesses and then one side or the other changes your mind after that order is entered and I have sequestered only witnesses on a specified list and then someone wanted to add to the list, those witnesses would be disqualified by virtue of the sequestration order.

MS. BENNICK: Judge, that's right. I have a real problem with that. I mean, the State has reserved its right to call rebuttal witnesses. I understand that. I have a right to call rebuttal witnesses. At this point I don't think it's anybody other than who I have told the State, but I do not know what's going to unfold here this afternoon or tomorrow or, you know, we have the certificate for Mr. Isenhour, the issue is fair. So I have a problem. If it's going to be sequestered it should be all of them, and I feel strongly about this.

THE COURT: Is there anyone that either side wishes to exclude from the sequestration order that is needed to help you assemble and coordinate the presentation of evidence? Specifically what I mean by that is it is often customary in the case of trials that each side might wish to have their lead investigator excluded from that sequestration so that that person could be at or near a

counsel table to assist in the coordination and presentation of evidence. Does either of you have anyone that falls into that category that you would seek to exclude?

MS. BENNICK: I don't think so, Judge. I don't have an investigator in this case. I have an investigator who was in the case in '76 but not he is working for me as an investigator. I don't have anyone.

THE COURT: Does the State?

MS. VANEEKHOVEN: Yes, Your Honor, we do. He was the chief investigator of the case back in the '70s. He's in the front row here along with the other officers that worked this case and we'd ask that he at least be able to remain.

THE COURT: Who was that chief investigator?

MS. VANEEKHOVEN: It was David Taylor.

THE COURT: What says the defendant in that regard?

MS. BENNICK: Well, Your Honor, you know, this is an old case and this is not a current case. This is an MAR hearing for violation of defendant's constitutional rights among a few other sentencing arguments. I don't see why that chief investigator today is like something they might need to run out and do something to investigate it. That's not the issue that's before the Court. So yes, I do

have a problem with that.

THE COURT: Tell me why Mr. Taylor would need to be excluded from the order.

MS. SHANLEY: I'm sorry, why he would need to be excluded or need to be here?

THE COURT: Why he would need to be excluded from the sequestration order or why he would need to be here.

MS. SHANLEY: Your Honor, I counted in the defendant's motion for appropriate relief they have alleged 16 times that the officers, including Sergent Taylor, attempted to mislead the Court, the jury, and that's going to be the basis I believe to mislead them about this evidence, about these lab reports. So I feel like his name is going to come up over and over about what he did or did not do.

We've also learned that the defense attorneys for Mr. Long back then had an interview with the officers prior to trial and we believe they did obtain information about this case. So when they're up upon the stand I'm going to want to be asking Detective Taylor what he recalls about the interviews with them, what they discussed, if they discussed pieces of evidence and things like that. So I do believe that we are going to be needing to discuss things with him. Certainly this case occurred 32 years ago. Ms.

Vaneekhoven and I have done a good job reading the transcript, but we need someone who was actually there and will know the people involved and the issues at hand.

MS. BENNICK: Judge, I don't know where this is coming from about Mr. Taylor.

THE COURT: You don't know what?

MS. BENNICK: They haven't had any interviews with Mr. Taylor. They never, they didn't have any interviews with Mr. Taylor in 1976. There's been no interviews by any of my witnesses with Mr. Taylor since I've been entered in this case. I don't know what the reference is to.

MS. SHANLEY: Your Honor, I don't know what she's talking about. The defense was kind enough to send me a transcript for the first motion for appropriate relief. In that transcript both Mr. Adkins and Mr. Fuller testified. And in that the State asked them is it not true that I arranged a meeting with you and the officers to discuss discovery and motions to suppress, and both said yes. And I think it was Detective Taylor specifically who they met with. Of course we'll need to pursue that. So in the transcript they did meet with them prior to trial to discuss some of these issues.

MS. BENNICK: That's not the testimony in the MAR transcript. The testimony is the colloquy between then

district attorney Bob Roberts who was cross examining Mr. Adkins and Mr. Fuller, cross examination of their testimony in regard to the jury systematic exclusions of blacks from the jury issue. And the colloquy was between Mr. Roberts, and Mr. Fuller and Mr. Adkins were asked by Mr. Roberts, then DA Bob Roberts, whether or not he had provided to them full file discovery in the case. And their answer was, to the best of their knowledge he had given them full discovery. That is all. It has nothing to do with David Taylor.

I'm happy to give Your Honor a copy of this. David Taylor's name is not mentioned in this MAR transcript. This MAR transcript had nothing to do with what we're here to do today.

MS. SHANLEY: Your Honor, if I could --

MS. BENNICK: It's a totally different issue and the only exchange was between Mr. Roberts and these two gentlemen who tried Mr. Long's case (indicating) about discovery that was provided. David Taylor appears nowhere in here.

MS. SHANLEY: Your Honor, if I could just read on page 24, this is the question of Mr. Fuller. All right. Do you recall whether or not you interviewed witnesses prior to trial regarding the motion to suppress?

I think so.

Beg your pardon?

Answer: I think so. I know we talked to Mr. Long. Seems to me we talked to some police officers that Mr. Roberts made available.

At some time?

And then his answer: I can't tell you when. Here's my best recollection. I know I'm under oath. But I have to say, I really can't swear to this, my best recollection is we went to Mr. Roberts and said, here's what we need to do. We need to talk to this person and this person. And I recall he said, not only fine, but he would set it up. And then I think he made the call.

So based on their testimony of what they recall back in 1988, they did meet with officers and discuss this case. Detective Taylor was the chief officer. We believe that the lead detective in that case, that he would have of course been the one they spoke with.

THE COURT: Here's what I'm going to do. In the exercise of discretion, the defendant's motion for sequestration of witnesses is allowed. Any witness that will be called on by the defendant or by the State to testify in this proceeding shall be excluded from the courtroom prior to the testimony of that witness. After completing their testimony each such witness may remain in the courtroom from that point forward, provided that if

remaining in the courtroom that person may not again be called as a witness at any later time in this proceeding, nor shall any witness or potential witness in this case engage in any conversations or discussions with any other witness, directly or indirectly, concerning the subject matter of the testimony of such other witness or potential testimony of such witness.

And of course in the event that I learn of any witness having spoken with any other witness, then that will result in such sanctions as I determine, including, but not limited to, the exclusion or striking of any testimony offered by such witness found to have violated the terms of this order.

There will, however, be excepted from this order the following persons: David Taylor, who may remain in the courtroom at all times during this proceeding to assist counsel for the State in the coordination and presentation of evidence. Secondly, Mr. Karl Adkins and Mr. James Fuller, who may remain in the courtroom at all times during this proceeding to assist defendant's counsel with the coordination and presentation of the evidence in this matter.

Now, I'm excluding or I'm excepting Mr. Taylor, Adkins, and Fuller from being excluded from the courtroom, but I am not excepting them from the other provisions of

the order. In other words, the fact that they will be remaining in the courtroom throughout the proceedings does not give them the right to discuss their testimony or other witness' testimony with those witnesses.

Does everyone understand the effect of that order?

MS. BENNICK: I do, Your Honor.

MS. SHANLEY: Yes, Your Honor.

THE COURT: Let's take a ten-minute recess during which time you all can exchange those items we discussed. We will come back and have a little bit less than 30 minutes to proceed. Then we'll take a lunch hour and then we'll go forward this afternoon.

All right. We'll be in recess for about ten minutes then.

(A recess was taken from 11:53 until 12:10.)

(Counsel for the State, counsel for the defendant, and the defendant are present in the courtroom.)

THE COURT: All right. Were you all able to exchange that information during the break?

MS. BENNICK: Yes, Your Honor.

MS. SHANLEY: We were, Your Honor. And also that is a revised witness list we just did, taking names off, not adding to.

THE COURT: Okay. What other matters then do we need to address? As I said, we've got about 20 minutes

left before the lunch hour. Let's see if we can address any remaining issues and at least be in a position to proceed with presentation of evidence immediately after lunch.

MS. BENNICK: I suppose only, Your Honor, if they want to address the authentication issue on whether I really need to get somebody from the hospital here or not.

MS. VANEEKHOVEN: Your Honor, we can't address that matter. I would like to know what they intend to use these records for or if they're just simply going to introduce them. I don't see what the relevance of these would be for this specific hearing.

MS. BENNICK: The relevance, Your Honor, make a proffer, is that these records were not turned over to the defense counsel in 1976. And contained in those records is a form where the Concord Police Department signed to pick up evidence from the hospital and take it back to the police department, which is a piece of the whole puzzle here. And that information was never given to defense counsel in 1976. It's another sort of withheld piece of evidence that while not directly exculpatory, it's sort of part of the, I can't think of the, lack of a better word, the scheme and it also is also newly discovered.

THE COURT: I'm sorry?

MS. BENNICK: And it also was newly discovered.

MS. VANEEKHOVEN: Your Honor --

MS. BENNICK: I think it will tie in if I'm allowed to, when I start to begin to question the witnesses.

THE COURT: Well, the question at this point is not the admissibility, but the authenticity. I mean, that's really what we're talking about is whether or not to bring the records custodian. Does the State have concerns about the authenticity of the records?

MS. VANEEKHOVEN: We do not have a concern with regard to the authenticity. However, we will certainly make the argument, when the Court would like to hear from us, regarding the admissibility of these records.

THE COURT: So can the parties agree then that the records may be received without further authentication, but also without any determination as to the actual admissability of the records?

MS. BENNICK: That's fine with me, Your Honor.

MS. VANEEKHOVEN: Yes.

THE COURT: And by doing that we can at least alleviate the need for a records custodian coming in and provide the authentication of the record.

MS. BENNICK: I think so, Your Honor.

THE COURT: Well, that addresses that issue. The other issue then would be the issue of motion for

funds for preparation of the defense case.

MS. BENNICK: Correct.

THE COURT: Is the State ready to proceed on that matter?

MS. VANEEKHOVEN: Your Honor, actually we are not. They were kind enough to make a copy of this at the break. We honestly haven't had a chance to read it. It's 13 pages. We were doing a couple of other things at the break. We would like to have some time over the lunch break to review cases they've cited, as well as try and have our own.

THE COURT: Let's hold that until after lunch then.

Now, are there other matters in the nature of housekeeping matters, preliminary matters, anything that either the State or the defendant would like to address at this time?

MS. BENNICK: I can't think of anything else, Your Honor.

THE COURT: Do you wish to proceed with opening statements at this time or hold that until after lunch?

MS. BENNICK: Your pleasure.

MS. SHANLEY: Your Honor, we are planning to waive our opening until our case anyway.

MS. BENNICK: And I'll waive opening statement,

too.

THE COURT: Well, Ms. Bennick, let me ask you for something which frankly you may want to take some time over the lunch hour to prepare this for me.

MS. BENNICK: Yes, Your Honor.

THE COURT: One thing, I have read through as much of this material as I could before today. I haven't been able to read through the entire trial transcript yet.

MS. BENNICK: I understand.

THE COURT: But one thing that would be extremely helpful to me would be if at some point in time in the presentation if defense counsel could present me with in effect a laundry list or a checklist of the items that you contend are newly discovered evidence.

MS. BENNICK: Oh, sure. I mean, Your Honor, if you want I can do that now.

THE COURT: Okay.

MS. BENNICK: The newly discovered evidence would be the -- can I consult with --

THE COURT: Yes, ma'am.

(Pause in the proceedings.)

MS. BENNICK: Your Honor, I believe that we're talking about two reports signed by Van Isenhour dated May, I believe, 12, 1976 -- one has no date on it actually. The other one is dated May 12th, 1976. And the three SBI lab

reports which have been sent to me with an authenticating affidavit from the records custodian at the SBI, a cover letter of John Waters, general counsel, and the victim's medical records which contain some other pieces of paper relevant, as I said, the police department picked up the rape kit from the hospital, but is all contained within the victim's medical records. So I think we're talking about two reports from Van Isenhour, three SBI lab reports, and the victim's medical records.

THE COURT: I just wanted to make sure that I knew exactly what items we're talking about.

MS. BENNICK: Sure.

THE COURT: Are right. Are there other matters the you all would like to address at this time?

MS. BENNICK: I don't have anything else at this time, Your Honor.

THE COURT: Then from the State?

MS. VANEEKHOVEN: No, Your Honor.

THE COURT: I think probably the best use of our time, rather than putting a witness on the stand to testify for ten minutes and then stop and take a lunch recess, I'm going to go ahead and recess for lunch at this time and plan to come back at 1:45.

MS. BENNICK: That's fine. Whatever time you say.

THE COURT: We'll be in recess until 1:45 this afternoon.

(A recess was taken for lunch from 12:20 until 1:50.)

(Counsel for the State, counsel for the defendant, and the defendant are present in the courtroom.)

THE COURT: All right. I'll hear from the defendant.

MS. BENNICK: Your Honor, are we back to the identification motion; is that where we are?

THE COURT: Is the State ready to go forward on that, the eyewitness identification expert?

MS. VANEEKHOVEN: We're ready.

MS. BENNICK: Your Honor, the crux of the motion is that it's our view that this was in essence a one witness identification case. There was no real physical evidence introduced against Mr. Long linking him to the crime.

The one piece of evidence that was tested which was the shoe print evidence, the SBI officer at the time, Agent Mooney, testified ultimately that he could not say that the shoe impression lifted from the scene of the crime matched either one of Mr. Long's shoes which had been taken from him and inked impressions taken that had been compared. So if you strip that away, the case really comes down to a one witness identification case.

Since 1976 there has developed a whole body of scientific evidence about the inherent unreliability of eyewitness identification. And in speaking with, when I was writing the MAR application and speaking with a number of those people across the country, was, you know, they helped me to identify any number of factors in this case that are highly suspect as what we know today. And those factors, include, but are not limited to, that there was no independent administrator.

Mr. Long's identification, original identification was made, my words, a courtroom show up, which is highly unusual. No lineup, no photo array. They then subsequently shortly after that array, after that identification a photo array was shown. I think research now shows, I'm told, that, you know, a subsequent identification is highly likely since a victim just picked it out. Cross racial identification is an enormous problem.

And so -- and there were many other factors present in this case. The suspect wore a hat, a weapon was used, a knife was used when the victim was first attacked. And there are any number of factors that have been identified as contributing to the possibility of a false identification. And given that this is down, we are down to what I believe is a one witness identification case,

that to understand the context in which this ID was made and all the factors that come into play that make the identification unreliable, it's important for the Court to consider in the totality of the circumstances, which is one of the tests under *Brady*, and some of the other relevant cases, looking at the cumulative effect and the totality of the circumstances at the time.

And, you know, the question is not whether Mr. Long would more likely than not have received a different verdict, but whether in its absence he received a fair trial, understanding that as a trial resulting in a verdict worthy of confidence, which is *Strickler v. Greene* and *Kyles v. Whitley*, two U.S. Supreme Court cases.

In the motion -- and in addition, to sidetrack for a moment, I think the fact that eyewitness identification is now widely recognized as a problem, and a big problem, as reflected in our legislature's own enactment of the Statute 15A-284.52 just this year, and the statute is entitled Eyewitness Identification Reform. And a big piece of the statute is, I believe, the legislature recognizing that lineups and photo arrays need to be meticulously conducted. The statute really addresses how the lineups should be conducted, an independent administrator, not one of the arresting or investigating officers, the way in which the lineups should be presented, the way in which photo arrays

should be presented, what kind of instructions the eyewitness should or should not receive prior to the lineup or the photo array being given. The eyewitness is now required to acknowledge receipt of those instructions in writing.

The statute goes on to talk about the fillers and what kind of fillers are appropriate or inappropriate in a lineup or even in a photo array. And the statute, you know, is lengthy. And I believe that that is all in support of what we now know is that eyewitness identification is inherently unreliable. And I believe it's not only recognized in the scientific fields, but now is recognized in the legal community, has been nationwide for some time, and now I believe our legislature has given credence to that idea by adopting the statute. And so that's the basis of my application.

THE COURT: Why am I not barred from even considering this issue?

MS. BENNICK: I don't understand why you would be barred.

THE COURT: Under 15A-1419(a)(2).

MS. BENNICK: 1419, Your Honor?

THE COURT: The issue was confirmed by the North Carolina Supreme Court in this case. On the direct appeal did not the North Carolina Supreme Court directly

address the issues pertaining to eyewitness identification in this case?

MS. ZANIN: Yes, Your Honor, but we believe that with respect to the current motion that's before the Court that the new scientific evidence is relevant and the accuracy of the ID is relevant for the Court's determination of the materiality element of the *Brady* claim that Mr. Long is making today. It goes towards how much weight the Court should give in looking back at whether or not Mr. Long received a trial that resulted in a verdict worthy of confidence. And the weight that the identification should be given when you're making that determination legally has been impacted by the change in science since the time that the Supreme Court made that decision. And therefore it's relevant not in terms of precluding her identification or suppressing her identification, but rather in terms of deciding whether just her identification and what we know today about eyewitness identification would have been enough or is enough to support the verdict against Mr. Long, or whether in light of the recent science, that the verdict should not be worthy of confidence. So in other words, it goes to the materiality element.

THE COURT: Okay. Well, take me through the analysis then. What would the defendant, what

determination would the defendant have me make? In other words, as I go back and read the opinion in this case from, that was written by Justice Moore -- did this predate the existence of the North Carolina Court of Appeals such that --

MS. SHANLEY: No, Your Honor, this was a capital case.

THE COURT: Oh, it was?

MS. SHANLEY: Yes.

MS. BENNICK: I don't believe this was a capital case.

MS. ZANIN: This was not a capital case.

MS. SHANLEY: It was a capital case, but the death penalty had been suspended at the time. My understanding is that the appeal went directly to the Supreme Court.

THE COURT: This was during the time that a person could still receive the death penalty for first degree burglary or first degree rape?

MS. SHANLEY: Yes, even though the death penalty was suspended at that time.

THE COURT: It was not tried capitally.

MS. SHANLEY: That's correct, but it was a capital offense.

THE COURT: And that's how it wound up, how the

direct appeal wound up in front of the Supreme Court.

MS. BENNICK: I honestly don't know.

THE COURT: So in any event, the case did go to the North Carolina Supreme Court and I believe Mr. Adkins represented the defendant in that appeal, according to the opinion. And there were issues raised in the direct appeal, in fact the defendant's first assignment of error was based on the contention that the pretrial identification procedure was so impermissibly suggestive that admission of the in-court identification violated due process.

Now, since the North Carolina Supreme Court has already dealt with that issue which under the statute tells me that that operates as a bar to my granting a motion for appropriate relief based on that same issue, the issue underlying the motion was previously determined on the merits upon an appeal or upon the previous motion or proceeding in the courts of this state or a federal court, unless since the time of such previous determination there has been a retroactively effective change in the law controlling such issue.

Now, you mentioned the fact that the legislature has adopted a new procedure for identification proceedings.

MS. BENNICK: That's correct.

THE COURT: So I guess a number of questions

then arise from that.

One, would those procedures apply to the particular process, the particular identification process that was used in this case if the law were applicable at the time?

Two, does that since enacted statute apply retroactively to this case either under the present scenario or in the event that a motion for appropriate relief is granted and the case is sent back for retrial, would the statute apply to this case upon retrial?

And three, why would that, why would this issue not be barred by the fact that issue has been litigated both at the trial level and through the direct appeal?

MS. ZANIN: Your Honor, I don't think we're asking you to re-evaluate the due process claim made on either of those levels. What we're saying is that in light of the new evidence that we're bringing to the Court today, that the weight or the probative value of the original identification should be weighed again in the context of the evidence that is available and was available at the time that Mr. Long was tried.

So the method of identifying the defendant that was used is relevant to determining the *Brady* claim itself in a different way than the Court looked at it.

THE COURT: Okay. As to the materiality aspect of the Brady --

MS. BENNICK: That's right.

THE COURT: Then let me ask you again something I asked a while ago. I guess I got myself a little bit sidetracked on that. Then help me by, let's walk through the analysis that the defendant would have me make in that regard. In other words, in order to rule favorably for the defendant on this point, what's the logical progression I would need to go through to get, to arrive at that end? Do you see what I'm asking?

MS. ZANIN: I'm trying to see what you're asking.

MS. BENNICK: I think we're not --

MS. ZANIN: I'm not sure that I understand the question.

THE COURT: Okay. Let me put it another way. If after hearing the evidence I rule in favor of the defendant on this point, what are the steps, what are the findings I'm going to need to make to arrive at that order that grants relief to the defendant?

MS. BENNICK: Well, I think, Your Honor, that if you were to rule in favor that the evidence that was excluded, the exculpatory evidence that was not turned over in 1976 is in fact a basis of the *Brady* claim, then perhaps in making that decision you have to, I believe the case requires you to look at the totality of the circumstances

and the weight of the evidence in reaching the materiality decision, unless I am misreading the cases. But that, I believe that it's not that things are looked at in a vacuum. It is that things are looked at together. So had this evidence been available to Mr. Long at his trial and not have denied him his due process right to a fair trial -- now I've lost my train of thought.

THE COURT: If this evidence had been evaluated when considered together with the evidence that was actually introduced and weighed against the eyewitness identification evidence, would a different result likely have ensued?

MS. BENNICK: And that's the point. That's where I was going. Thank you. Sorry.

THE COURT: All right. Tell me how the eyewitness identification expert becomes necessary in that regard.

MS. ZANIN: The eyewitness identification expert would be able to share with the Court the recent developments in science that have taken place since Mr. Long's trial that demonstrate the weight that should be given to that method that was used to identify Mr. Long in this case.

THE COURT: What says the State?

MS. SHANLEY: Your Honor, the State says that

the defendant to no avail has had at least four opportunities to attack the identification of the victim that she identified the defendant.

First, at the pretrial suppression motion they extensively questioned her about that and the judge let it in. Then when she was on the stand they cross examined her about all of these issues that they want you to consider appointing an expert to discuss. They questioned her about her fear, whether she thought she was going to die; her opportunity to observe the defendant; the fact that she -- how familiar was she with people of another race, with cross racial issues. Your Honor, they were able to cross examine Detective Taylor when he had her identify the defendant at his court proceeding. And then in the closing argument to the jury they argued all these things that they're bringing up again to that jury. And yet he was convicted.

Then as you mentioned, they took this same issue to the Supreme Court. The Supreme Court analyzed the identification and found "there is little likelihood of mistaken identification". And now they want to dance over two difference standards to ask you to appoint an expert who, based on my research and training by the Institute of Government, has never been allowed in North Carolina. I cannot find one case where an expert witness on

identification has been admitted.

I've already addressed the *Garner* case, the *State v. Garner* where the defendant wanted this type of expert in its underlying case and then for his motion for appropriate relief. It was denied. And in this case the Court of Appeals cites *State v. Abraham*. That's a North Carolina Supreme Court. That's 338 NC 315, a 1994 case. And in that case the defendant was claiming error because he did not, he was not able to procure funds to hire an identification expert. And the Court, the Supreme Court found there, just like the Court of Appeals Court found in *Garner*, that the reason that identification expert is not related to the case or is not something the defense should have because an expert would have only testified to matters within the common understanding of the jury. Cross racial, whether the victim had a knife at her throat, her opportunity to see, are all factors that a jury would be able to determine, and thus an expert would not be able to help them assess that.

Your Honor, those are cases involving jurors. In a case such as this one, the issues would be before a judge, someone with much more experience to draw on. I contend that North Carolina has never admitted this type of evidence and shouldn't do so here.

Now, in *The State v. Garner* the defendant wanted to

allow this evidence for the motion for appropriate relief, and as we discussed before, it did not meet the seven factors of the *State v. Britt* case for new evidence. They want to talk about that this is new scientific evidence. Well, this evidence would merely tend to contradict, impeach, or discredit the testimony of our former witness. That's it. That's all it does. And that's what's not admissible.

So the State would pay for this expert, the State would review the case, and then what would they do? They never met the victim. They were not here in district court when she had the opportunity to observe 12 other African-American males the same general age range as the defendant, because that's what Detective Taylor said was in the room when she came. She wasn't there when the victim was at the hospital bed and instead of just the six photos that the new law requires, she was given a lineup of 13 photos. And yet she did not identify anyone in those 13 photos and the defendant's photo was not among them. And then after she came to the district court and she was there with these people, she had been there an hour, and she sees the defendant. She identifies him. The expert wouldn't have been there. And then the expert wasn't there when she goes back to the police department and they produce more photographs for her, this time including the defendant's

photograph, and she picks it out.

Your Honor, in this case the defense consistently says that the identification was not strong. And it reminds me of the saying, saying it doesn't make it so. The witness' identification was very strong. By reading the transcript you can tell she was a very intelligent woman and she had her thoughts about her, even on this night. She says in her testimony that she thought she wasn't going to make it, so she promised him, let me make a phone call and I'll get you all the money I can get you.

She had her wits about her that when he wanted to take her up the stairway. She thought I will not make it alive if he takes me there. So she fought and she stayed downstairs. When he said he needed to go she rushed after and slammed the door because she knew the door would lock and he couldn't re-enter. Your Honor, she had her wits about her and she was very bright.

But on that stand and in front of that jury she testified that she had three different opportunities to observe the defendant in a position closer to her than most people are ever close to another. She said that when he attacked her at first in the den that the light from the television was there and there was also a lamp in the den. And she said that she saw his face. She said at some point he kept telling her, don't look at my face. And she said,

I had to look after he said that, and he said it over and over and over.

And then he took her to a bedroom where he wanted her money. And she said there was a lamp on in the bedroom and she saw his face again. And she said he even tried to step out of the light so I couldn't see it, but I saw it. And then when he took her back to the stairwell and raped her, Your Honor, there was the hall lamp on and she said, he was on top of me and I saw his face. She never hesitated. She never wavered. When she picked out the defendant she didn't change then, and 32 years later she has not changed.

Now, when the officers asked her, how sure are you, how sure of your description? She not only described his face, she described his walk. She said when she saw him in the courtroom it was his voice, it was his mannerism. She said when he walked by me it was just like him walking out of my house the night of the rape.

The defense in their brief says that she never mentioned the facial hair. That is incorrect. And the transcript of the trial shows that to be true. She says she always identified him by the scruffy beard that he had and the little slight mustache. Although the defendant at trial had shaved all that off, the defense had introduced photos of him a couple days before at a party with that scruffy beard and the mustache. The State also introduced

his booking photo where he had that mustache and that beard.

She said that she would never forget him. She said, I'll never forget the way he talked to me, the way the voice sounded. She got to hear that again in that district court. She said his general appearance left no doubt in my mind he was the person who raped me. She has never wavered. With the 13 photos at the hospital, the 12 African-American men who were in the district courtroom, the seven photos she saw in the lineup after that, she had the opportunity to look at 31 African-American men and she picked out one and that was the defendant.

So, Your Honor, this expert who comes in won't know any of that, wasn't there to see it, wasn't there to see her hesitate or not, and to be strong and to be sure. She'll just come or he'll just come and speak in vague generalities about things we already know. They attempted it at the trial and they failed. They attempted it at the Supreme Court and they failed.

Your Honor, I'd ask that we not or that you would deny their motion to appoint this expert, someone who has never been able to testify in North Carolina anyway, and deny their motion.

MS. ZANIN: May I be heard, Your Honor?

THE COURT: Yes, ma'am.

MS. ZANIN: The State is placing a lot of emphasis on the certainty of the witness in making her identification of the defendant. And in fact, one of the things that's now been determined by the new science is that witness certainty is not a factor in determining whether or not the identification is accurate. Research demonstrates that witness confidence, although believed by lay people to be a strong predictor, in this case the jury, of the accuracy of an eyewitness identification, is not actually a strong predictor of identification accuracy.

In fact, also in our motion are some statements from a woman named Jennifer Thompson who was also the victim in a rape case and has now made it her life's mission to go around the country talking about her experience, because the person that she identified as raping her, Darryl Hunt, ultimately was exonerated. And what Ms. Thompson says in an article that she wrote for the New York Times on June 18th of 2000, she says I studied every single detail on the rapist's face. I looked at his hairline. I looked for scars, for tattoos, for anything that would help me identify him. When and if I survived the attack I was going to make sure that he was put in prison and he was going to rot.

She wrote, I knew that this was the man. I was completely confident. I was sure. Later DNA evidence

proved that another man, Bobby Poole, was in fact the perpetrator. And I believe I said Darryl Hall. It was actually Ronald Cotton who was the defendant in her case. Mr. Poole, the man whose DNA was found, was brought to Ms. Thompson who told the police, that's not him. I've never seen him before my life, when in fact the DNA evidence proved that it was Mr. Poole that had raped Ms. Thompson.

Witness certainty is not a factor. However it does have a huge impact on the jury and that's one of the reasons that we're asking you to appoint the expert in this case to discuss issues such as that. In addition, the evidence that we're seeking to, the evidence that we have raised in this *Brady* motion, the three SBI reports, go directly to identification of the defendant in this case and we believe they contradict the identification that was provided by the victim in this case and in that regard outweigh the weight of the identification done by the victim and contradicts the evidence that --

THE COURT: Well, isn't that a determination for the Court though?

MS. ZANIN: Isn't -- I'm sorry, Judge. We didn't hear you.

THE COURT: Isn't that a determination for the Court to make, that is, doesn't it ultimately come down to my weighing of that evidence, the identification evidence,

whatever evidence was used at trial to convict the defendant against the Brady material, that it has now been located and to make a determination as to whether or not a different result likely would have ensued had that *Brady* material been available to the defendant at the time of his original trial?

MS. ZANIN: Yes, as the finder of fact that is your decision. And we'd like to present this additional testimony to be considered by Your Honor as he is making that finding of fact.

THE COURT: How is that going to assist me in that regard, your proposed expert?

MS. ZANIN: By walking through the current science involved in making identifications and helping the Court determine the weight that the identification should be given as additional factual information for the Court in deciding weight.

THE COURT: It appears to me this determination depends at least in part upon application of Rule 702 of the Rules of Evidence. If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion.

The defendant is requesting funds to retain an expert in the field of eyewitness identification to provide testimony to the Court as to the, what appears to be, as I understand it, what the defendant contends to be the probative value or the lack of to be attributed to eyewitness identification testimony when considered and balanced against Brady material that has now been discovered by the defendant and his counsel pertaining to this matter.

As I understand it, the testimony anticipated from such expert would include, among other things, testimony as to the scientific advancements which have been made since 1976 with respect to the reliability of eyewitness identification and the weight or probative value which should be attached to such forms of evidence in making those determinations.

It appears, however, that the ultimate issue in that regard is what would a jury likely have done, how would the jury have weighed the eyewitness identification evidence that was actually produced at trial if the jury also had had an opportunity to consider any evidence which could and likely would have been presented by the defendant in light of the information now available under the *Brady* material discovered by defendant's counsel in connection with this motion for appropriate relief.

In this regard what I'm going to do is I'm going to provide an opportunity to counsel to present to the Court any published writings, any learned treatise, or professional articles containing information which may be of assistance to the Court in making these determinations which I will consider and of which matters I will also consider, I'm not saying that I definitely will, but I will consider taking as a matter of judicial notice. And having done that, with that avenue being made available to provide that information to me in making this determination, my conclusion is, aside from that, that the testimony of the requested expert, that there is not a forecast that the testimony of the expert would assist the trier of fact to understand the evidence or to determine any facts in issue in the case, and therefore the motion for funds for the expert witness as to eyewitness identification is denied.

All right. With that, I believe we are ready to go into the evidence.

MS. BENNICK: I believe we are, Your Honor.

THE COURT: All right. Who is the first witness?

MS. BENNICK: The first witness is outside. Do you want us to get him or how do you want to work it?

THE COURT: Well, it would be nice if we'd come up with some method whereby we can bring these folks in in

a timely basis without somebody having to -- if we can kind of coordinate them. And if you don't mind, perhaps even tell the bailiff who the next witness is going to be so that we can --

MS. BENNICK: We can do that.

THE COURT: -- kind of expedite that process as much as possible. Frankly that's the biggest down side to sequestration of witnesses is all the dead time we have while we're waiting for people to get in.

MS. BENNICK: Mine are all right outside the courtroom, Judge.

MS. VANEEKHOVEN: I just wanted to address the other matter. There are two other witnesses still in the courtroom that she informed me that she may call. They are officers here in the front row. So I'd like just a minute to talk with them and have them step out.

THE COURT: All right. Let's take care of those matters and in the meanwhile let's bring the first witness in.

RICHARD ROSEN, having been first duly sworn, testified as follows on,

DIRECT EXAMINATION

BY MS. ZANIN:

Q. Good afternoon, Professor. Could you please state your name for the record?

A. Richard Rosen.
Q. Can you share your educational background with the Court?
A. I am a graduate of Vanderbilt University and I have a JD degree from University of North Carolina School of Law.
Q. Where are you currently employed?
A. I'm a professor of law at UNC School of Law.
Q. And do you hold any other positions with the law school?
A. At the present, no. I was the senior associate dean, but I am now in called the phase retirement program. No other positions.
Q. Have you been affiliated with the Innocence Project at the law school?
A. I started the law school's Innocence Project back in the late 1990's.
Q. Did there come a time, Professor Rosen, when you became aware of the case of State versus Ronnie Long?
A. There was. I got a call and then a visit in my office from Mr. Pharr and I believe it was Mr. Long's sister came to me and asked me whether I would consider looking at Mr. Long's case.
Q. And did you consider it?
A. I told them that I would look at the transcript, read whatever materials they have, and at least make a

preliminary determination whether there was any possibility of doing anything with the case.

Q. And ultimately did the Innocence Project decide to look at the case?

A. Well, if I may, the usual protocol was for, when people made request for the students to -- it's a student project. It's a volunteer project which I supervise. Usually what happens is we would send the case to the students. They would make a determination whether there was a credible claim of innocence and any possibility of further investigation of the case. When I read the transcript in this case I was able to skip that stage and determine that it was a case worth pursuing, and I did that on my own without sending it to the students.

Q. Do you know an individual named Les Burns?

A. Yes. I know Les well and I have all my professional career.

Q. And how do you know Mr. Burns?

A. When I was in law school, I guess it was from '74 through 1976 I was interning at the Julius Chambers Law Firm and Les was a private investigator with that firm. I worked with him on some cases then. After I graduated and returned to North Carolina in 1980 I became involved in some capital post conviction cases and some claims of innocence and I worked very closely with Les on several of